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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. PD-0862-20

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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ANTHONY RUFFINS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

FROM THE DECISION IN THE THIRD COURT OF APPEALS,
CAUSE NO. 03-18-00540-CR

ON APPEAL FROM THE
207th JUDICIAL DISTRICT COURT
OF COMAL COUNTY, TEXAS
IN CAUSE NO. CR2016-614,
HON. DWIGHT PESCHEL, JUDGE PRESIDING

APPELLANT'S RESPONSE BRIEF

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ORAL ARGUMENT HAS BEEN GRANTED

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STATEMENT OF THE CASE

Appellant was indicted on September 14, 2016 of one count of aggravated robbery (C.R. at 5-9). He was convicted by a jury of aggravated robbery (C.R. at 140). Appellant elected to go to the trial court for sentencing (C.R. at 87). He was sentenced to life imprisonment (VIR.R. at 67).

On direct appeal, the Third Court of Appeals reversed Appellant's conviction, finding that an error in the accomplice-as-a-matter-of-fact instruction caused egregious harm. *Ruffins v. State*, 613 S.W.3d 192, 204 (Tex. App.—Austin 2020).

STATEMENT OF FACTS

On May 10, 2016 four men robbed Timeless Ink, a tattoo parlor in New Braunfels, Texas. A fifth man, Gustavo Trevino, testified at trial that he drove the car to the tattoo parlor, but did not go in (IIIR.R. at 205-08). A surveillance video showed the robbery take place (St's Ex. 42, VIIIR.R. at 45). After assaulting two employees and one customer, the robbers, all of whom were wearing masks, searched the building for money, took the victims' cell phones, then left (*id.*).

The lead detective on the case, John Mahoney (IVR.R. at 10), traced the stolen cell phones to an apartment complex in San Antonio (IVR.R. at 13-14),

where Olanda Taylor lived (IIIR.R. at 174-180; IVR.R. at 18). After an extensive investigation, Appellant (aka PoohBear) (IVR.R. at 35), Gustavo Trevino (aka Gus), Kenneth McMichael (aka Redd), Robert Ruffins (aka Robbie), and Olanda Taylor (aka Tazz aka Olanda Ruffins) (IVR.R. at 18; IIIR.R. at 39) were charged with aggravated robbery (IVR.R. at 43). David Hogarth, who was present during the planning of the robbery, was not charged (IVR.R. at 123).

Identity

The primary issue at trial was identity. The State called three witnesses to the stand to provide evidence that Appellant was one of the robbers: Detective Mahoney, David Hogarth, and Gustavo Trevino (IIIR.R. at 36, 187; IVR.R. at 6).

Detective Mahoney's trace of the stolen cell phones led him to Olanda Taylor, who had given the phones to some local residents (IIIR.R. at 174-80; IVR.R. at 13-14, 16, 18). Operating on the assumption that the other robbers would be close family or friends of Taylor, he used Facebook to develop several other suspects, including Appellant (IVR.R. at 17, 47; VIIIR.R. at 105). Mahoney also sought information from David Hogarth (IVR.R. at 93-94), who said he was present for the planning of the robbery and was there when they left to commit it (IIIR.R. at 44, 46, 236-37). Although Hogarth was initially uncooperative and untruthful (IVR.R. at 93-94, 21, 24-25, 97-98, 121-22; IIIR.R. at 72-73), withheld evidence (IVR.R. at 26-27; IIIR.R. at 87-88), and even helped one of the robbers

hide from police (IVR.R. at 121-22), he eventually gave Mahoney information after the police offered him money (IIIR.R. at 89). Hogarth said that his initial reticence and untruthfulness with the police was because Appellant had threatened him to stay quiet (IIIR.R. at 54-55, 92-93), but he also admitted that he initially thought of himself as a suspect (IIIR.R. at 96). Mahoney said he had not ruled Hogarth out as a suspect early on (IVR.R. at 108-09). Mahoney also admitted that he believed Hogarth himself had approached Gustavo Trevino's wife and told her to stay quiet (IVR.R. at 119-21, 123-24).

Mahoney's theory was that Appellant was the person in the surveillance video wearing the white hat (IVR.R. at 53-54). Hogarth's ability to identify who wore the white hat in the video varied—he initially said numerous people in the neighborhood wore that hat and he would be guessing at who it was (IVR.R. at 117-19, 152; IIIR.R. at 81), while at trial he said it was Appellant (IIIR.R. at 46). In addition to stating that "Tazz" and "Robbie" wore the identical white hat, he also told Mahoney that another unnamed man who used to hang out with them wore the hat as well (IVR.R. at 118-19). At trial, he also said Appellant was there during the discussions about committing the robbery and left with the others on the day it was committed (IIIR.R. at 44-46). Hogarth said he was not getting paid to testify and was just there to "do the right thing" (IIIR.R. at 93).

Tonya Ruffins, Robert Ruffins's mother, told police that the person in the white hat was her son, Robert, not Appellant (IVR.R. at 154-55).

The jury received an accomplice-as-a-matter-of-fact instruction on Hogarth and whether he was an accomplice was heavily contested (C.R. at 136-37). Hogarth denied aiding or directing the robbery, but admitted that he thought really hard about participating in it before deciding not to (IIIR.R. at 45-46, 90). He also admitted that he went on a scouting mission to the tattoo parlor with Taylor and Trevino, but said he didn't know it was a scouting mission until he was already in the car (IIIR.R. at 69-70, 90). Hogarth was also a drug dealer, who set up a different, failed robbery for Trevino and others just before the robbery at issue here took place (IIIR.R. at 73-74, 205, 234-35). Mahoney believed Hogarth was invited to participate in the robbery (IVR.R. at 99-100), but did not recommend that he be charged (IVR.R. at 123).

Gustavo Trevino gave conflicting testimony on Hogarth's role in the robbery. He said there was no scouting mission, but Hogarth just happened to be in the car as they were driving through New Braunfels talking about the robbery (IIIR.R. at 204, 221-22). He also said Hogarth was more of a "hang-around type of guy" rather than being "really in the plan" (IIIR.R. at 204) and he did not solicit, direct, encourage, or aid them in the robbery (IIIR.R. at 235-36). On the other hand, Trevino said he knew what the law of the parties was and he thought

Hogarth was just as guilty as the rest of them under that law (IIIR.R. at 223-24). He said Hogarth's feelings were hurt after the robbery that the others hadn't taken him with them (IIIR.R. at 237). He also said Hogarth was nervous when the police started calling and that he told Hogarth to get a lawyer because he thought he had some exposure in the case and wanted the police to leave him alone (IIIR.R. at 222-23, 236-38).

The jury received an accomplice-as-a-matter-of-law instruction on Trevino, who had already been convicted for his role in the robbery and agreed to testify in exchange for the State standing silent on his punishment (IIIR.R. at 188-92). Trevino said Appellant was one of the robbers, that he drove him to the tattoo parlor, and saw him get out of the car wearing a white hat (IIIR.R. at 205-09).

Alibi

Appellant's girlfriend, Shante Benton, testified that on May 10, 2016, she was planning her daughter's birthday party, which was the next day (IVR.R. at 200-01, 227-28). She said Appellant was with her the entire night (IVR.R. at 201-04).

Audio Recording and Motion for New Trial

At trial Mahoney testified that, during the week prior to trial, he re-watched the surveillance recording with prosecutors and realized that he could hear the words "PoohBear" and "Let's go, Pooh" stated in the video (IVR.R. at 83-85, 88-

89). He said he watched it "many, many times on different computers" before he began to hear Appellant's nickname (IVR.R. at 83).

At a motion for new trial hearing, Appellant introduced a forensic analysis and expert report on the audio recording, which found that that Mahoney was definitely wrong about "PoohBear" being said (VIIIR.R. at 183-85). And, the analysis found that the part where Mahoney said he could hear "Pooh" is inaudible, even with digital enhancement (*id.*).

Direct Appeal and Court of Appeals Opinion

Among other things, Appellant argued on direct appeal that the jury charge caused egregious harm by inverting the standard for determining whether David Hogarth was an accomplice (*Appellant's Brief* at 15-23, 26-35 (Tex. App.—Austin, NO. 03-18-00540-CR)). The charge placed the burden on the defense to prove that Hogarth was an accomplice beyond a reasonable doubt (C.R. at 137). It should have instructed the jury to presume that Hogarth was an accomplice unless it found beyond a reasonable doubt that he was not. The Court of Appeals agreed that this error caused egregious harm and reversed Appellant's conviction. *Ruffins*, 613 S.W.3d at 204. Justice Baker concurred, finding that there was also a separate charge error that required reversal. *Id.* at 217-22. Justice Goodwin dissented. *Id.* at 204-17.

SUMMARY OF ARGUMENT

FIRST GROUND FOR REVIEW

The Court of Appeals correctly found that the charge error caused egregious harm. Whether Hogarth was an accomplice was central to the State's case. The State relied on Hogarth both as substantive evidence on the question of identity, and as corroboration for its accomplice as a matter of law, Trevino. If Hogarth were treated as an accomplice, the State's case became significantly less persuasive because its primary theory for conviction would be eliminated.

The jury charge incorrectly created a presumption that Hogarth was not an accomplice. It should have done the opposite. The Court of Appeals was correct that, given the contested nature of the evidence that Hogarth was an accomplice, the presumption likely made the difference in the jury's evaluation of the evidence.

The court was also correct to evaluate the rest of the record to see if there was otherwise overwhelming evidence of guilt. The State is wrong when it says that the court should have been doing a sufficiency review in which it deferred to the view of the fact-finder. The jury was incorrectly instructed and there was therefore no fact-finder's view to defer to.

The State's closing argument underscores the harm this faulty instruction caused. The State actually read the incorrect part of the charge out loud and told

the jury "there is zero way you get there." Hogarth, it told the jury, was its most important piece of corroborating evidence for Trevino.

Finally, nothing in the jury charge ameliorated the error. In fact, the charge also contained a number of other errors that made it even more difficult to treat Hogarth as an accomplice.

SECOND GROUND FOR REVIEW

The State argues that Appellant is barred by the doctrine of invited error and by "general principles of estoppel" from complaining about the charge error because (according to the State) 1) he requested the instruction or 2) knowing the instruction's content, he accepted the instruction.

The Court of Appeals' decision only addressed the issue of invited error and this Court's review should therefore be limited to that doctrine. However, in an abundance of caution, Appellant addresses both concepts.

Here, defense counsel initially requested the correct instruction—a part of the record the State leaves out of its factual recitation. The trial court responded by stating that the correct instruction was in the charge, but it actually read the incorrect language out loud. Becoming confused, counsel repeated part of that language, then said, "I'm good."

It is undisputed that no change was made to the charge as a result of counsel's actions. The State does not dispute that fact. Instead, it argues that

estoppel should apply because it is a "flexible doctrine." However, the equitable doctrine of estoppel does not reach these facts. With one exception not applicable here, that doctrine requires that a defendant's conduct play some causal role in the error. Defense counsel neither caused the incorrect instruction to be in the charge, nor did he prevent the court from curing the error. Instead, at most, he withdrew his objection, and lost the benefit of the "some harm" standard on appeal.

THIRD GROUND FOR REVIEW

The State argues that no accomplice instruction was warranted in the first place and therefore the charge error was harmless. However, the facts more than support the trial court's conclusion that there was "conflicting or inconclusive" evidence that Hogarth could have been charged as a party or a conspirator to the robbery. The evidence showed that Hogarth was present during the planning stages, the scouting mission, and just prior to the execution of the robbery. There was evidence that he was invited to go along and, on the day of the crime, he wanted to go with, but was left behind—a fact that upset him. He himself admitted that he thought seriously about going with the others on the very day of the robbery. Moreover, the surrounding circumstances support the conclusion that Hogarth's presence during every stage of the robbery plan was not coincidental. After the robbery he thought he was a suspect, repeatedly lied to the police, and tried to cover up the crime. And, just prior to the robbery, he helped the others plan

a different, failed robbery. Under the doctrine of chances, this is evidence that his innocent explanation for being present during every stage of the robbery plot (i.e., that he was just hanging out) was false.

FOURTH GROUND FOR REVIEW

Finally, the State says that there was no charge error because, although it admits that courts have been placing the burden on the state in accomplice-as-a-matter-of-fact instructions for over a century, it contends that there is no requirement to do so. Its primary piece of support is the fact that the accomplice statute does not state where the burden should lie. However, this is unremarkable because the accomplice statute says very little about how its rule should be effectuated—that matter, including the existence of the accomplice-in-law and accomplice-in-fact distinction, has been developed through the common law.

In fact, placing the burden on the State is required by both the Due Process Clause and the Texas Penal Code. Because the State wishes to use a witness's testimony to meet its burden of proof, the Due Process Clause requires the State to prove that its own witness is reliable enough to meet that burden. Moreover, Section 2.05(b) of the Penal Code expressly states that, when a presumption benefits the defense, and the initial burden of production has been met, the State must disprove the fact in question beyond a reasonable doubt. Article 38.14 creates a presumption that a witness's testimony is unreliable. Once a fact issue about the

witness's reliability is raised, 2.05(b) puts the burden on the State. Other provisions of the Penal code and the Code of Criminal Procedure reflect the same principles. With the exception of affirmative defenses, the burden of persuasion is always on the State to disprove that evidence is inadmissible or unreliable.

ARGUMENT

FIRST GROUND FOR REVIEW: The Court of Appeals did not err in applying the egregious harm standard and it correctly found that there was egregious harm in the case at bar.

The primary issue at trial was identity, i.e., whether or not Appellant was one of the masked men who committed the robbery. The vast majority of the State's evidence on identity was comprised of the testimony of accomplice-as-a-matter-of-law Gustavo Trevino and David Hogarth, both of whom identified Appellant (IIIR.R. at 46, 205-09). *Ruffins*, 613 S.W.3d at 200. Its theory for conviction was that Hogarth should serve as corroboration for Trevino (VR.R. at 44 (State arguing that its most important piece of corroboration was Hogarth)). If, however, Hogarth was an accomplice, the State's theory fell apart and it would need to find corroboration elsewhere not only for Trevino, but also for Hogarth.

The accomplice-as-a-matter-of-fact instruction on David Hogarth created a presumption that he was not an accomplice (C.R. at 137). It required proof beyond a reasonable doubt to overcome that presumption (*id.*). The charge should have said the exact opposite, telling the jury to presume that he was an accomplice

unless there was proof beyond a reasonable doubt that he was not. *Ruffins*, 613 S.W.3d at 199, 202.

In evaluating the record for egregious harm, the primary question should be: what effect did inverting the burden of proof have on the jury's deliberations? *See Ellison v. State*, 86 S.W.3d 226, 228 (Tex. Crim. App. 2002). Did it make the State's case for conviction clearly and significantly more persuasive? *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991). The answer here is a resounding yes. The State got an enormous advantage in securing a conviction from the inverted burden and Hogarth's accomplice status went to "the very basis of the case." *Almanza v. State,* 686 S.W.2d 157, 172 (Tex. Crim. App. 1985).

I. The jury charge misled the jury at every turn.

The State says that the jury charge as a whole was not harmful because the charge gave an accomplice-as-a-matter-of-law instruction on Trevino, which required corroboration. *State's Brief* at 19-20. It posits that this could have made the jury ignore its instructions regarding Hogarth and instead apply Trevino's instructions to Hogarth. *Id.*

This line of reasoning does not involve considering the jury charge as a whole. *Almanza*, 686 S.W.2d at 171. It involves ignoring the jury charge as a whole. There was nothing whatsoever in the charge that told the jury to apply the Trevino standard to Hogarth (C.R. at 135-37).

Next, the State says that the jury charge wasn't harmful because it told the jury that it had to find Appellant guilty beyond a reasonable doubt. *State's Brief* at 20-21. But, that fact does nothing to mitigate the error. The charge made it more than likely that the jury treated Hogarth as a regular witness whose testimony did not need to be corroborated. Therefore, his testimony could be used to reach the beyond a reasonable doubt standard without needing to be corroborated. Tex. Code Crim. Proc. Art. 38.14. And, his testimony could be used to corroborate that of the accomplice-as-a-matter-of-law, Trevino. *Fields v. State*, 426 S.W.2d 863, 865 (Tex. Crim. App. 1968). A general reasonable doubt instruction did not lessen the impact of that error.

In addition, the charge contained additional errors that made it even more difficult to treat Hogarth as an accomplice. It 1) defined an accomplice as someone who could have been convicted of the crime, rather than someone who could have been charged (C.R. at 136);[1] 2) failed to tell the jury that Hogarth was culpable if he could have been charged with a lesser-included offense (C.R. at 136-37);[2] and

[1] *Appellant's Brief* at 23-24 (Tex. App.—Austin, NO. 03-18-00540-CR); *Zamora v. State*, 411 S.W.3d 504, 510 (Tex. Crim. App. 2013).

[2] *Id.*

3) failed to explain that, in order to be a conspirator, Hogarth did not have to intend the aggravated robbery or conspire to commit it (C.R. at 136).[3] [4]

The charge also made a damaging comment on the weight of the evidence when it failed to instruct that the jury had to find both Hogarth's and Trevino's testimony to be truthful and to show Appellant's guilt before using it to convict him (C.R. at 135-37). Instead, it assumed their testimony was true, that it satisfied the reasonable doubt standard, and that, if they were accomplices, the jury only had to consider corroboration before convicting. *Appellant's Brief* at 35-41 (Tex. App.—Austin, NO. 03-18-00540-CR). The *Ruffins* concurrence wrote that this error "further compounded the harm described by" the majority. *Ruffins*, 613 S.W.3d at 221.

The jury charge weighs heavily in favor of egregious harm. *Almanza*, 686 S.W.2d at 171. It misled the jury at every turn regarding how to treat the most critical piece of evidence at trial: David Hogarth's testimony (C.R. at 136-37).

[3] The correct charge could have made a difference to the jury, given the State's argument that Hogarth was too "soft" and didn't have the "street courage" to commit aggravated robbery (VR.R. at 44).

[4] *Appellant's Brief* at 25-26 (Tex. App.—Austin, NO. 03-18-00540-CR); Tex. Penal Code § 7.02(b).

II. The State emphasized the error in its closing argument and the arguments of both sides show that the error went to the heart of the case.

The State also says that, because it discussed the corroboration requirement for Trevino during its closing argument, the jury might have concluded that it had to have corroboration for Hogarth as well. *State's Brief* at 21-22. Once again, this conclusion requires ignoring the record.

The State could not have been more clear during its closing argument that 1) Hogarth was not an accomplice (VR.R. at 44 (reading erroneous part of charge and stating that "there is zero way you get there")) and 2) Hogarth himself was its most important piece of corroborating evidence for Trevino (*id.* (referring to corroboration for Trevino and stating, "And most importantly, you have David.")). Far from conflating the law that applied to Hogarth and Trevino, the State distinguished Hogarth from Trevino as the key to Appellant's conviction (*id.*; *see also* VR.R. at 83 (State stating that case "would have gone in a totally different direction" if not for Hogarth)).

And, conversely, Hogarth being an accomplice was central to the defense. Defense counsel argued adamantly that Hogarth was an accomplice, who should not be believed and who could not be used as corroboration for Trevino (VR.R. at 50-52, 54-55, 57-62, 64-65).

The closing arguments show that Hogarth not being an accomplice was the State's principal theory for conviction. The charge error not only "substantively affect[ed] the potential theories of liability upon which the jury could convict Appellant," it substantively affected the primary theory of liability upon which the jury could convict Appellant. *Gonzalez v. State*, 610 S.W.3d 22, 24 (Tex. Crim. App. 2020). This factor should weigh heavily in favor of harm.

III. There was conflicting evidence on whether Hogarth was an accomplice and the inverted presumption likely made all the difference.

The focus of the state of the evidence prong should be to examine the fact question underlying the error. *See Ellison*, 86 S.W.3d at 228. The fact question here is whether David Hogarth was an accomplice (C.R. at 137). Although the State glosses over the importance of this step, the Court of Appeals was correct to start off its state of the evidence inquiry by examining the probative evidence on this question. *Ruffins*, 613 S.W.3d at 200-02.

As a general rule, if the evidence underlying the charge error is genuinely contested, the state of the evidence weighs in favor of harm. *See Sanchez v. State*, 209 S.W.3d 117, 122-24 (Tex. Crim. App. 2006) (fact that jury could have decided either way on fact issue underlying charge error weighed in favor of egregious harm); *Hollander v. State*, 414 S.W.3d 746, 752 (Tex. Crim. App. 2013) (same); *Reeves v. State*, 420 S.W.3d 812, 820 (Tex. Crim. App. 2013) (evidence weighed

in favor of harm where issues were contested and Court would not weigh in on underlying fact determination because that is "a function reserved for a properly instructed jury") (also noting that evidence was not overwhelming).

Here, the evidence on Hogarth's accomplice status was hotly contested. Although Hogarth denied involvement, there was evidence that he was invited to participate in the robbery (IIIR.R. at 45-46; IVR.R. at 99-100) and that he ultimately accepted, unsuccessfully attempting to commit the robbery with the others (IIIR.R. at 237 (Hogarth hurt that left behind on night of robbery)). After being present for every stage of the planning of the crime, even he admitted that he was seriously considering going along on the night of the robbery itself, which indicates that he was part of the conspiracy at least up to that point (IIIR.R. at 44-46, 236-37). Hogarth also helped the others plan a failed robbery immediately before the crime in question here (IIIR.R. at 205, 234-35).[5]

In addition, the nature of the charge error makes it even more likely that a contested fact issue would have a significant effect on the jury's deliberations. Given that Hogarth's accomplice status was contested, it is very likely that the jury would stick with whatever presumption it was given because to depart from that presumption would require proof beyond a reasonable doubt—no small hurdle given the state of the evidence (C.R. at 137). The Court of Appeals made a similar

[5] Appellant discusses this evidence in more detail under the third ground for review, below.

observation in its opinion, noting the difference the inverted presumption made in light of the evidence. *Ruffins*, 613 S.W.3d at 201-02. By virtually ensuring that the jury did not treat Hogarth as an accomplice, the charge made the State's case for conviction "clearly and significantly more persuasive." *Saunders*, 817 S.W.2d at 692.

IV. The Court of Appeals was correct to ask whether the other evidence of guilt was overwhelming, not whether it was legally sufficient to sustain a conviction.

A charge error is unlikely to have caused harm if a jury would overwhelmingly have convicted even without the error. *See Elizondo v. State*, 487 S.W.3d 185, 209 (Tex. Crim. App. 2016). For this reason, the Court of Appeals was correct to ask whether the other evidence of guilt, i.e., the corroborative evidence, was overwhelming. *Ruffins*, 613 S.W.3d at 202.

The State takes issue with this approach. It says that the Court of Appeals should have been asking whether there was legally sufficient corroborative evidence to sustain a conviction. *State's Brief* at 22-23, 28-30, 31-32. If the answer was yes, it should have found that the error was harmless. *Id.* However, this Court has expressly stated that this is not so. *Casanova v. State*, 383 S.W.3d 530, 534

(Tex. Crim. App. 2012). Whether there is sufficient evidence to convict does not answer the egregious harm question. *Id.*[6]

In keeping with its sufficiency of the evidence approach, the State also says that the Court of Appeals improperly put itself in the role of the fact-finder and failed to defer to the jury's guilty verdict when evaluating the state of the evidence. *See, e.g.*, *State's Brief* at 28-30, 32. In *Casanova v. State*, this Court expressly rejected that argument as well. There, the State made the same argument, claiming that the Court of Appeals should have deferred "to the view of the fact-finder" in conducting an egregious harm analysis. *Casanova*, 383 S.W.3d at 534. The Court disagreed. When an incorrect jury instruction was delivered to the jury, there is "no fact-finder's view to which an appellate court can defer for purposes of assessing egregious harm…" *Id*. Instead, a reviewing court must take all of the evidence into account, including the contested issues and the weight of the probative evidence. *Hollander*, 414 S.W.3d at 749-50.[7]

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[6] A number of the State's quotes from caselaw in this section are potentially misleading because, although the quotes are discussing the sufficiency standard, the State treats them as if they apply to the *Almanza* harm analysis. *See, e.g.*, *State's Brief* at 28 *quoting Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009), *Brooks v. State*, 323 S.W.3d 893, 922 (Tex. Crim. App. 2010), *and Smith v. State*, 332 S.W.3d 425, 442 (Tex. Crim. App. 2011), 30 *quoting Smith*, 332 S.W.3d at 442, 32 *quoting Casanova*, 383 S.W.3d at 539 *and Smith*, 332 S.W.3d at 447.

[7] If other aspects of a jury's verdict, independently from the charge error, speak to the jury's view of the evidence, that information should be include in the harm analysis. *See, e.g.*, *Wooten v. State*, 400 S.W.3d 601, 609-10 (Tex. Crim. App. 2013) (jury's rejection of self-defense instruction spoke to how jury would have viewed sudden passion evidence). This case does not present such a scenario.

The State also claims that the Court of Appeals improperly "explained away" its corroborative evidence. *State's Brief* at 29. However, the Court of Appeals is required to consider the "weight" of the probative evidence. *Hollander*, 414 S.W.3d at 749-50. What the State calls "explaining away" was in fact the process of considering the entire record. For each piece of evidence, the Third Court examined both its strengths and weaknesses in order to discern its probative value. *Ruffins*, 613 S.W.3d at 202-03.[8] As the State would have it, the Court should exclusively look to the strengths of the State's evidence—an approach that would require it to ignore the *Almanza* standard.

V. The State's other evidence was, on its face, weak, tenuous, and required inferences that a jury might readily reject.

Corroborative evidence must tend to connect a defendant to the commission of the crime. Tex. Code Crim. Proc. Art. 38.14. Merely "point[ing] the finger of suspicion" at a defendant is not enough. *Losada v. State*, 721 S.W.2d 305, 308 (Tex. Crim. App. 1986).

Although developed in the context of a different kind of accomplice instruction error, the Court's guidance on how to evaluate the strength of corroborative evidence is useful here. In *Casanova*, the Court said that the standard

[8] In its opinion, the court mistakenly wrote that a gun and gloves were found in Appellant's father's apartment. *Id.* at 203. In fact, police found a gun and gloves in the apartment of a person named Deshay Carter, where Olanda Taylor was supposed to be living (IVR.R. at 45-46).

for evaluating corroborative evidence is whether the evidence is "inherently unreliable, unbelievable, or dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject." 383 S.W.3d at 539. Reliability is diminished when there is a "rational and articulable basis for disregarding the non-accomplice evidence or finding that it fails to connect the defendant to the offense." *Herron v. State*, 86 S.W.3d 621, 633 (Tex. Crim. App. 2002).

In *Casanova*, the Court said a charge error did not cause egregious harm because, in order to disbelieve the corroborative evidence, the jury would have to accept the defendant's "less-than-creditable explanations" that "defie[d] plausibility." *Casanova*, 383 S.W.3d at 540.

Here, a jury would not have to accept "less-than-creditable explanations" in order to reject the State's corroborative evidence. Rather, as discussed below, evaluating the State's evidence on its face shows that it is inherently weak and unreliable, and depends "upon inferences from evidentiary fact to ultimate fact that a jury might readily reject." *Id.* at 539.

a. The "PoohBear" testimony was based on an audio recording so garbled and indistinct that it could not serve as reliable evidence connecting Appellant to the crime.

At trial, Detective Mahoney testified that, right before trial, he "realized" during "discussions" with prosecutors that he could hear Appellant's nickname, "PoohBear," and the words, "Let's go, Pooh," in the surveillance video (IVR.R. at

83-84, 88-89). If the jury did require corroboration for Hogarth's testimony, it likely relied on this, as there was little else for the jury to turn to. *See infra* at 23-28.

However, Mahoney's "PoohBear" testimony is not strong corroborative evidence because the quality of the audio is so poor that it is extremely difficult to make out what is being said (State's Ex. 42, 5:25-35 (time represented in exhibit video clip), 11:59:21-30 (time reflected by security camera[9])). In fact, Mahoney said he had listened to the audio countless times over the course of years without suspecting that the words "PoohBear" or "Pooh"[10] were uttered in it (IVR.R. at 83 (Mahoney listened to the recording "many, many times on different computers" before hearing Appellant's nickname), 88-89; *see also id.* at 86 (admitting that he also thought it said, "Let's go, Bro")).

In addition, at a motion for new trial hearing, Appellant introduced evidence that Mahoney was wrong. A forensic auditory analysis found that that Mahoney was definitely wrong about "PoohBear" being said (VIIIR.R. at 183-85). And, the analysis found that the part where Mahoney said he could hear "Pooh" is inaudible, even with digital enhancement (*id.*). If this case is retried, no rational jury would be

[9] Both of these times reflect the same moment in the surveillance video and are displayed in State's Exhibit 42.

[10] There was also no evidence that Appellant had ever gone by the nickname, "Pooh" (*see* IVR.R. at 35 (Appellant's nickname was "PoohBear")).

able to rely on Mahoney's testimony for corroboration. *Almanza*, 686 S.W.2d at 171 (reviewing court should consider entire record in harm analysis).

Even setting aside the fact that the motion for new trial evidence showed that Mahoney's testimony was dead wrong, the garbled, indistinct audio recording was inherently unreliable and constitutes evidence that the jury "might readily reject." *Casanova*, 383 S.W.3d at 539.

b. The white hat evidence depended upon inferences from evidentiary fact to ultimate fact that a jury might readily reject.

The State says that a social media photo of Appellant wearing a "fairly distinctive" hat similar to the hat worn by one of the robbers tends to connect him to the crime. *State's Brief* at 26. But, the State fails to acknowledge all of the evidence surrounding the white hat. The post with the white hat was from four months before the crime (VIIIR.R. at 99). The evidence showed that a number of people wore an identical white hat (IVR.R. at 118-19, 152-53; VIIIR.R. at 103, 105) and the hat itself was not unique enough to create confidence that it was the same hat shown in the video (*cf.* VIIIR.R. at 92). Indeed, two social media post showed Robert Ruffins wearing the same kind of hat and his mother identified the person in the surveillance video wearing that hat as Robert (IVR.R. at 135, 154-55; VIIIR.R. at 103, 105).

The evidence about the white hat was so open-ended that the State itself told the jury that it did not have to believe Appellant wore the white hat in order to

convict and Mahoney testified that the white hat evidence was not enough even to charge Appellant with the crime (VR.R. at 94; IVR.R. at 55). There is a "rational and articulable" basis for a jury to disregard this evidence or to find that it failed to connect Appellant to the crime—too many people wore the hat to reliably conclude that Appellant is depicted in the surveillance video and the evidence that Appellant wore a white hat was from four months before the robbery. *Herron,* 86 S.W.3d at 633. This is evidence that a jury "might readily reject." *Casanova*, 383 S.W.3d at 539.

c. Appellant was not living at the Palms, nor was he closely associated with the perpetrators.

At trial, the evidence showed that one of the robbers, Tazz Ruffins (aka Olanda Taylor), took the victims' cell phones from Timeless Ink, brought them to the Palms, where he was living, and ultimately gave them away (IIIR.R. at 175-180, 182-83). Nothing about that evidence was connected to Appellant (*id.*). Nevertheless, the State says this evidence connects Appellant to the robbery because he was living at the Palms. *State's Brief* at 27. There are two problems with that argument.

First, although the State repeatedly says that Appellant was living at the Palms, it provides no citations to the record to support that claim. *State's Brief* at 27. In fact, the non-accomplice evidence showed that Appellant was seen at the

Palms a single time (IVR.R. at 23). Detective Mahoney said he did not know where Appellant lived (IVR.R. at 158).

Second, there was no evidence linking Appellant's single visit to the Palms with the cell phones Taylor brought there. It would require pure speculation for a jury to conclude that presence in a large apartment complex at a different date and time somehow tied Appellant to the cell phones (IVR.R. at 14 (around one thousand people lived at the Palms)).[11]

The State also says that Appellant was "closely associated" with the perpetrators, which it says connects him to the commission of the robbery. *State's Brief* at 26. The non-accomplice evidence does not show that either. Rather, it shows that Appellant was related to two of the perpetrators and appeared in two Facebook photos with them (IVR.R. at 132; VIIIR.R. at 98, 102). *Cruz v. State*, 690 S.W.2d 246, 248-51 (Tex. Crim. App. 1985) (fact that defendant lived near victim and knew both the victim and accomplice insufficient to "tend to connect" him to the crime).

The only evidence regarding a connection to the third perpetrator, McMichael, is the fact that Appellant commented on a Facebook post in which

[11] The same is true of the safe found in the dumpster, which was "consistent with" the safe taken from the tattoo shop, but was never linked to the robbery or to any individuals at the Palms (IIIR.R. at 181).

McMichael appears (VIIIR.R. at 105). This is hardly a "close association." There was no evidence connecting him to the fourth robber, Trevino.

In addition, the State does not explain how the fact that Appellant knew some of the perpetrators connects him to the commission of the offense. *Zamora v. State*, 432 S.W.3d 919, 927 (Tex. App.—Houston [14th Dist.] 2014) (op. on remand) (fact that appellant had known intended victim of assassination plot since childhood did not tend to connect him to the crime). There was no non-accomplice evidence showing that he had anything to do with them near the time or place of the offense. *See Nolley v. State*, 5 S.W.3d 850, 855 (Tex. App.—Houston [14th Dist.] 1999) (being seen with accomplice 36 hours after crime "does not in any way tend to connect the appellant with the crime"); *Cruz*, 690 S.W.2d at 248-51 (fact that defendant knew accomplice and victim insufficient where no evidence that he was near victim's house or with the accomplice around time of murder).

Finally, the State says that Appellant's comment to a Facebook post tends to connect him to the robbery because it references a "shooter" and uses emojis of a squirt gun, a bomb, and a knife (VIIIR.R. at 105). *State's Brief* at 26. However, that post was from February of 2016, not May of 2016 when the robbery occurred (VIIIR.R. at 105). *See Cruz*, 690 S.W.2d at 249-50 (fact that defendant had been seen with a rifle and a pistol in the past did not tend to connect him to commission of crime, even though victim shot with a rifle and a pistol). The State hypothesizes

that Appellant could have posted his comment at any time. *State's Brief* at 26 n.17. But, there is no evidence whatsoever that he posted his comment around the time of the robbery and nothing in the post indicates that he did. In addition, even if it had been posted near the time of the robbery, it makes no reference to the robbery (VIIIR.R. at 105). And if, as the State contends, the post is meant to say that they would not harm a family member, then it would not refer to the robbery, since the owner of the tattoo shop was Trevino's cousin (IVR.R. at 139-40). *State's Brief* at 26.

d. Appellant repeatedly and consistently denied involvement in the robbery during his police interview.

The State says Appellant "showed no reaction" when he watched the video of the robbery and that this is evidence tending to connect him to the commission of the crime. *State's Brief* at 27. In fact, Mahoney did not say Appellant "showed no reaction" but instead stated that he did not "cringe," "act shocked," or say, "Oh, my gosh" (IVR.R. at 59).

In any event, to draw the conclusion the State proposes would require the jury to speculate. Speculation is "mere theorizing or guessing about the possible meaning of facts and evidence presented." *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). There was no evidence introduced at trial that a guilty person would have been less likely to cringe while watching the video than an innocent person. No doubt if Appellant had cringed while watching the video, the State

would now try to cast that as evidence of guilt as well. This is simply not a basis on which a rational jury could draw a conclusion about Appellant's guilt or innocence.

Detective Mahoney also stated that, during the interview, Appellant said, "If you say I did it, I did it. If you say it's me, it's me." (IVR.R. at 60). At the same time, Mahoney said that Appellant consistently maintained his innocence throughout the interview (*id.* at 59-61). Nevertheless, the State claims that Appellant's statement is evidence tending to connect him to the commission of the robbery. *State's Brief* at 27. But, there is no question from Mahoney's testimony that Appellant was not admitting guilt—Mahoney himself made that clear (IVR.R. at 59-61). Thus, although Mahoney said he thought Appellant's statement was "strange," the most likely meaning to be drawn from Appellant's statement is that he was commenting on the fact that Mahoney kept accusing him, no matter what he said (IVR.R. at 60-61 (Appellant kept saying he was innocent even after Mahoney "laid out all of [his] evidence")).

There is a reason the State fought tooth-and-nail to use Hogarth as its corroborative evidence. Its other evidence was unconvincing, requiring tenuous factual inferences that could easily be rejected. *Casanova*, 383 S.W.3d at 539. The decision of the Court of Appeals should be upheld.

VI. The State does not give an accurate account of the corroborative evidence.

In its brief, the State gives its own account of the corroborative evidence. *State's Brief* at 24-28. Apparently because it believes a legal sufficiency standard should apply, it does not attempt to represent the entire record, but instead lists only evidence it contends tends to connect Appellant to the robbery. *Id.* As shown below, its rendition of the record has serious flaws from both a legal and factual perspective.

a. An accomplice cannot corroborate himself.

The State begins by stating that Detective Mahoney's testimony about what Hogarth told him constitutes independent evidence corroborating Hogarth's testimony on the stand. *State's Brief* at 24-25, 28. In other words, Hogarth corroborated himself. However, "[A]n accomplice's testimony cannot be corroborated by prior statements made by the accomplice witness to a third person." *Smith*, 332 S.W.3d at 439. The State's position not only violates precedent from this Court, but it would also destroy the accomplice rule set out in Article 38.14 by effectively eliminating the requirement of non-accomplice corroborative evidence. Tex. Code Crim. Proc. Art. 38.14.

b. One accomplice cannot corroborate another accomplice.

The State also claims that the Court should consider accomplice-as-a-matter-of-law Trevino's testimony. *State's Brief* at 24, 25. However, it is a fundamental

principle that the testimony of one accomplice witness cannot corroborate the testimony of another accomplice witness. *Fields*, 426 S.W.2d at 865.

c. Mahoney did not identify Appellant in the surveillance video.

The State next claims that Detective Mahoney identified Appellant in the surveillance video based on his "gait" and "appearance." *State's Brief* at 25. This is unequivocally not the case. Instead, in the part of the record the State cites, Mahoney is explaining why he did not believe a witness who identified a different person than Appellant in a still picture taken from the video footage (IVR.R. at 156-58, 169-70). He said he did not believe her because the photograph was limited:

> "I chose to consider that the picture she was looking at showed someone whose face was covered up, and there's nothing next to it to determine how tall they are, the shade of his skin, you can't see the way that he walks."

(IVR.R. at 157). Later, he stated that, in general, a witness would have an easier time making an identification from a video than from a still picture because a video would allow a witness to hear people talking or observe a distinctive walk (*id.* at 170).

In no part of this testimony, was Mahoney himself making an identification of Appellant. Indeed, at the time Mahoney is describing, he had never met Appellant (*see* IVR.R. at 57 (Appellant was last suspect to be arrested)). Later,

Mahoney was also given the opportunity to state why he believed Appellant was the person in the video wearing the white hat. He did not state that he recognized his "gait" or "appearance" (IVR.R. at 53-54; (*see also* IVR.R. at 15-16 (Mahoney saying he would not be able to recognize someone from video if he ran into them at the Palms)).

d. The fact that a crime was committed does not tend to connect Appellant to the crime's commission.

The State says that the surveillance video itself is evidence connecting Appellant to the crime. *State's Brief* at 25. However, the robbers wore masks and the victims could not identify anyone (IIIR.R. at 123-24; VIII R.R. at 45). In fact, the whole issue in this case is one of identity. Therefore, the video "merely shows the commission of the offense." Tex. Code Crim. Proc. Art. 38.14. *See also Gaston v. State*, 324 S.W.3d 905, 911 (Tex. App.—Houston [14th Dist.] 2010) (video of robbery did not tend to connect defendant to crime because perpetrator wore mask).

e. Evidence connecting Trevino to the crime does not tend to connect Appellant to the crime.

The State says that evidence placing accomplice-as-a-matter-of-law Trevino's white Volvo near the tattoo shop around the time of the robbery tends to connect Appellant to the crime. *State's Brief* at 25. However, the only evidence connecting Appellant to the Volvo was accomplice testimony (IIIR.R. at 46, 205).

Accomplice testimony cannot be used for corroboration. Tex. Code Crim. Proc. Art. 38.14; *Fields*, 426 S.W.2d at 865.

f. Mahoney's "course of investigation" testimony about co-defendant Taylor does not tend to connect Appellant to the crime.

The State says that the fact that Mahoney played co-defendant Taylor's police interview for Appellant is evidence tending to connect Appellant to the commission of the robbery. *State's Brief* at 24, 28. It offers no explanation as to how this could be so. The contents of Taylor's interview were not introduced into evidence (IVR.R. at 58).

The State also says that the fact that Mahoney received "lots of information" from Taylor is evidence connecting Appellant to the robbery. *State's Brief* at 28. In fact, Mahoney said Taylor gave him "identifying information about other possible suspects" without stating what information or which suspects (IVR.R. at 33). There was no evidence that Taylor named Appellant (*id.*).

Finally, the State says that the timing of Appellant's arrest warrant is evidence connecting him to the robbery. *State's Brief* at 28. After discussing social media photos he found online, the following colloquy took place between Mahoney and the prosecutor:

> Prosecutor: And was Anthony Ruffins one of the possible suspects that you were interested or looking into at that point in time?
>
> Mahoney: Yes. I had obtained an arrest warrant for him on June 11, the day after interviewing Olanda Taylor.

(IVR.R. at 34). Mahoney did not say that he received information during the interview that helped him procure an arrest warrant. He was investigating all of the suspects at once and was giving the timeline on the course of his investigation (IVR.R. at 34-35 (describing Facebook "stalking" Appellant and the other suspects)). This is not evidence that Taylor accused Appellant.

Taylor refused to testify at Appellant's trial (IVR.R. at 148). What he said during his police interview was never introduced into evidence and the Court should not heed the State's attempt to now pretend that it was.

g. There is no evidence that Appellant fled from the police.

Detective Mahoney said that one day, as he was pulling up to the Palms apartment complex, he saw Appellant standing near some stairs at the complex (IVR.R. at 23). He then saw Appellant "quickly" leave the area (*id.*). The State claims that Mahoney's use of the word "quickly" means that Appellant fled from the police and therefore had a consciousness of guilt. *State's Brief* at 27.

First, there was no evidence that Appellant left the area because the police were pulling up (IVR.R. at 23). In fact, there was no evidence as to why Appellant was there at all, nor why he left (*id.*). Mahoney himself made no claims that Appellant noticed the police car or was responding to his presence when he walked away (*id.*).

Second, walking away from the presence of the police is not flight and does not indicate guilt of anything. It is not even enough to justify a *Terry* stop. *United States v. Monsivais*, 848 F.3d 353, 360 (5th Cir. 2017) ("[T]he Supreme Court has made it abundantly clear that unless a police officer has reasonable suspicion to conduct an investigatory stop, an individual has a right to ignore the police and go about his business." (internal quotations omitted)).

Third, even if a jury could conclude from this evidence that Appellant had seen a police car pulling up, Mahoney himself explained to the jury that it was very common for people to avoid the police at that apartment complex and he was not surprised that people did not to want to talk to him (IVR.R. at 19-20).

Similarly, the State also claims that the fact that Appellant was arrested in Houston somehow is indicative of a consciousness of guilt. *State's Brief* at 27. However, Mahoney provided no evidence that there was anything unusual or illicit about Appellant being in Houston at the time of his arrest (IVR.R. at 57). Nor did he claim that Appellant went to Houston immediately after the robbery (*id.*). In fact, as the State admits, Mahoney himself said he saw Appellant at the Palms sometime after the robbery, which shows that he did not flee (IVR.R. at 23). Appellant being in Houston is not evidence of consciousness of guilt because there is no basis to believe his being there was related to the robbery at all. *Cf.*, *Cruz*,

690 S.W.2d at 250-51 (arrest near border of Mexico several states away with other murder suspects not enough to tend to connect to crime).

h. The State subpoenaed Appellant's alibi witness and knew exactly where she was, and her testimony does not tend to connect him to the robbery.

The State claims that Appellant "refused to name" his alibi witness and kept her location a secret until she "miraculously materialized" for the first time at trial. *State's Brief* at 34. This is patently untrue. In fact, the State was the one who subpoenaed Benton to testify and therefore knew both her name and how to find her (IVR.R. at 198). At trial, Detective Mahoney initially tried to act as though he did not investigate Appellant's alibi because Appellant did not give him enough information about Benton to track her down (IVR.R. at 61-62), but later admitted that he did have enough information to find her on social media, but decided not to pursue the lead (IVR.R. at 159-60). That Appellant would provide more information regarding his alibi witness to his defense lawyer than to a detective or prosecutor is neither surprising, nor suspicious (IVR.R. at 228-29 (defense investigator spoke with Benton over a year before trial)).

The State also says it was suspicious that Appellant asked Benton to testify. *State's Brief* at 28 n.25. It does not explain how this could possibly tend to connect him to the robbery. Presumably, all defense witnesses are asked by the defense to testify.

Next, the State appears to argue that any time a defendant is convicted after presenting an alibi witness, that witness's testimony is transformed into evidence of guilt. *State's Brief* at 28 n.25, 31. The cases the State cites do not support that contention. *Id.* They say that an attempt to set up a false alibi is some evidence of guilt. *Brooks v. State*, No. 08-17-00026-CR, 2018 Tex. App. LEXIS 2913, at *19 n.5 (Tex. App.—El Paso Apr. 25, 2018, pet. ref'd) (mem. op., not designated for publication); *Longoria v. State*, 154 S.W.3d 747, 757 (Tex. App.—Houston [14th Dist.] 2004).

Here, Appellant told the police from the beginning that he had been with his girlfriend on the night of the robbery and his girlfriend came to trial to testify to that fact (IVR.R. at 61, 202-04). This is not evidence of his guilt. There was no evidence that Appellant asked his girlfriend to give false testimony.

Moreover, a rejection of Appellant's alibi does not strengthen the State's own evidence. As discussed above, it is the weakness of the State's evidence on its face—regardless of any defensive evidence—that demonstrates that it is "inherently unreliable, unbelievable, or dependent upon inferences from evidentiary fact to ultimate fact that a jury might readily reject." *Casanova*, 383 S.W.3d at 539. The corroborative evidence was far from overwhelming and the Court of Appeals' opinion should be upheld.

SECOND GROUND FOR REVIEW: Neither invited error nor estoppel prevent appellate review of the charge error.

This Court's review is limited to "decisions of the courts of appeals." *Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995) (quotation omitted). Here, the Court of Appeals' decision only addressed the issue of invited error, not estoppel more broadly (which the State did not argue in its briefing below). *Ruffins*, 613 S.W.3d at 198. For that reason, this Court's review should be limited to whether the doctrine of invited error applies in this case. Nevertheless, in an abundance of caution, Appellant addresses both concepts below.

The State says that a person is estopped from complaining about a charge error if "knowing full well" the charge's content, he "accepts" the instruction. *State's Brief* at 39. This, according to the State, occurred when counsel said, "I'm good" during the charge conference. *Id.* at 38-39.

In *Bluitt v. State*, this Court held that saying "no objection" to a jury charge did not prevent appellate review of an error in the charge. 137 S.W.3d 51, 53 (Tex. Crim. App. 2004). Although the State does not acknowledge *Bluitt* in its brief, it does argue that this is not like the "no objection" scenario because Appellant "requested the specific instruction he now complains of." *State's Brief* at 40.

Absent from the State's account of the facts is the fact that, at the charge conference, defense counsel initially requested a correct instruction. He said:

> You know what, I just thought of something. I'm sorry, Judge. I still think that, with a question of fact, that the instruction "therefore, if you believe" -- the application instruction, "therefore, if you believe from the evidence beyond a reasonable doubt that an offense was committed and you further believe from the evidence that the witness" -- in this case it would be David Hogarth -- "**was an accomplice or you have a reasonable doubt whether he was or was not** as the term is defined in the foregoing instructions, then you cannot convict the Defendant upon the testimony of -- unless you further believe that there is other evidence in the case outside of testimony of David Hogarth tending to connect the Defendant with the offense charged in the indictment."

(VR.R. at 20-21 (emphasis added)). Here, counsel is asking for an instruction that creates a presumption that Hogarth is an accomplice unless the State proves otherwise beyond a reasonable doubt. This is the correct instruction. *Ruffins*, 613 S.W.3d at 199, 202.

What happened next is the subject of the State's estoppel argument. The trial court told defense counsel that his requested instruction was already in the charge (VR.R. at 21). The court said, "And it says in there they have to find that he is an accomplice beyond a reasonable doubt." (VR.R. at 21). Counsel then repeated part of the trial court's language and said he did not think that language was in there (VR.R. at 22). It was at this moment that defense counsel confused the language "you have a reasonable doubt whether he was or was not" with the language "find that he is an accomplice beyond a reasonable doubt."

The State then read the incorrect part of the jury charge out loud (V.R.R. at 22). Defense counsel said, "I'm good" (*id.*).

The Court of Appeals was correct that "the totality of Ruffins's objection indicates that he was requesting" the correct instruction. *Ruffins*, 613 S.W.3d at 198. However, it found that, after counsel confused the correct language, he effectively withdrew his objection. *Id.* The effect of this was that the Court of Appeals applied the egregious harm, rather than some harm, standard on appeal. *Id.* The effect was not to estop him from raising the charge error altogether.

The Court of Appeals also correctly found that the doctrine of invited error does not apply because no change was made to the charge as a result of counsel's objection. *Id.* The State does not dispute that fact. Instead, it argues that estoppel should apply because it is a "flexible doctrine." *State's Brief* at 39-40. But, it does not explain how that flexibility would mean that the causal element in the estoppel doctrine, which is key in the very caselaw it relies upon, should cease to be of critical importance. *Id.*

This Court's opinion in *Wappler v. State* is instructive because it demonstrates the critical importance of causation in the estoppel doctrine. In *Wappler*, the Court of Appeals had held that defense counsel prevented the trial court from inadvertently curing an earlier error and was therefore estopped from complaining of that error on appeal. 138 S.W.3d 331, 332-33 (Tex. Crim. App.

2004). The trial court had improperly limited voir dire and, later, mistakenly thought it needed to dismiss the jury panel because it was too small. *Id.* at 331-32. Defense counsel objected to dismissing the panel, pointing out that it was not necessarily too small. *Id.* This Court held that neither estoppel, nor invited error, applied because the causation element was missing: defense counsel's objection to dismissing the panel did not prevent the trial court from curing the error in limiting voir dire and therefore did not lead it into error. *Id.* at 333.

Wappler shows that causation is critical when applying the doctrines of estoppel or invited error. One thing is certain in the case at bar: defense counsel's actions had no impact at all on the content of the charge. At the moment he requested the correct instruction, the charge had already been written (VR.R. at 19 (charge filed with clerk prior to objection)). After counsel made his objection, the charge remained the same (*id.* at 22-23 (immediately after counsel said, "I'm good," charge read to jury)).

In addition, the trial court never offered to put the correct instruction in the charge, so defense counsel did not prevent it from curing its earlier error in including the incorrect instruction (*id.* at 19-23). *Cf.*, *Wappler*, 138 S.W.3d at 333. In fact, the trial court did not appear to understand the nature of counsel's request at all (*id.* at 20-22).

Every case the State cites requires a causal element before applying the doctrine of estoppel—with one exception—*Deen v. State*, which sets out the doctrines of estoppel by judgment or contract.[12] But, those doctrines have no bearing on the facts of this case. They apply when a person enjoys the benefit of a contract or judgment, then later decides to attack that same contract or judgment. *Deen v. State*, 509 S.W.3d 345, 349-51 (Tex. Crim. App. 2017) (defendant who accepted benefit of illegally lenient judgment could not later attack that judgment's validity).

The concept of estoppel is ultimately rooted in equitable principles. *See Schmidt v. State*, 278 S.W.3d 353, 358 n.9 (Tex. Crim. App. 2009). It is not fair to complain of an error one caused. Nor is it fair to enjoy the benefits of a contract or judgment, then later try to attack the validity of that same contract or judgment.

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[12]*See State's Brief* at 36-40 *citing Prystash v. State*, 3 S.W.3d 522, 529-30 (Tex. Crim. App. 1999) (trial court took language out of charge at defendant's request); *Woodall v. State*, 336 S.W.3d 634, 645-46 (Tex. Crim. App. 2011) (defendant induced error by refusing trial court's remedy to Confrontation Clause violation); *Ex parte Pete*, 517 S.W.3d 825, 832-33 (Tex. Crim. App. 2017) (defendant who requested mistrial could not complain that "same jury" not there in both phases of trial); *Padon v. State*, No. 03-17-00695-CR, 2019 Tex. App. LEXIS 8455, at *19-23 (Tex. App.—Austin Sep. 20, 2019, no pet. h.) (mem. op., not designated for publication) (defendant repeatedly agreed to take lesser-included out of charge); *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003) (because State gave rap sheet to defendant and represented that it was correct, it could not complain that the rap sheet was inadmissible on basis of identity); *Druery v. State*, 225 S.W.3d 491, 506 (Tex. Crim. App. 2007) (defendant requested that lesser-included instruction not be given); *Carbough v. State*, 93 S.W. 738, 738-39 (1906) (defendant requested instruction and trial court gave that instruction in compliance with request); *Woodard v. State*, 322 S.W.3d 648, 659 (Tex. Crim. App. 2010) (defendant helped prepare complained of lesser-included instruction).

There is, however, no equitable principle that would bar appellate review of this charge error.

In addition, the State does not read the trial record in context. It is evident that trial counsel did not change his mind and decide he wanted a standard detrimental to his client (VR.R. at 20-22). No criminal defendant could benefit from the instruction that was given. Instead, the record shows that counsel confused the wording of the two standards, both of which discuss the reasonable doubt standard (*id.*). In doing so, Appellant lost the benefit of the "some harm" standard on appeal. *Ruffins*, 613 S.W.3d at 198. He did not, however, induce the error, nor did he benefit from it. The Court of Appeals' decision should be upheld. *Id.*

THIRD GROUND FOR REVIEW: The trial court was correct to give the jury an accomplice-as-a-matter-of-fact instruction on Hogarth.

I. The totality of the circumstances are relevant when deciding whether an accomplice instruction is warranted.

The State says that the trial court should not have given an accomplice-as-a-matter-of-fact instruction on Hogarth in the first place and therefore the charge error was harmless. *State's Brief* at 41-43. It says that much of the evidence on Hogarth's conduct before, during, and after the robbery should not be considered because, standing alone, it does not constitute an "affirmative act." *State's Brief* at 42 n.33. The State makes the cardinal mistake of looking at individual facts in

isolation instead of as part of the record as a whole. In fact, courts should consider "the cumulative force of all the incriminating evidence" in determining whether an individual was a party to an offense. *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006). *See also Zamora*, 411 S.W.3d at 510 (participation before, during, and after the crime is relevant to the inquiry). Moreover, direct evidence of an affirmative act is not required. *Powell*, 194 S.W.3d at 506 ("Circumstantial evidence alone may be used to prove that a person is a party to an offense.").

The State makes the same mistake when discussing its caselaw. All the State's cases show is that a court must look to the totality of the circumstances. For example, the fact that a witness was present just before or during the commission of a crime does not in itself determine whether an accomplice instruction was warranted. The State's cases demonstrate that a court must look at all of the surrounding facts to make that determination. *Ferguson v. State*, 573 S.W.2d 516, 518 (Tex. Crim. App. 1978) (after refusing to participate in robbery, witnesses threatened with being shot); *Kunkle v. State*, 771 S.W.2d 435, 440 (Tex. Crim. App. 1986) (witness did not act as a lookout and, although present, "was against the robbery and murder"); *Druery*, 225 S.W.3d at 496-97, 499-500 (witnesses in question did not believe a murder was about to take place, were terrified when it did happen, started crying and screaming, and believed they were about to be killed

as well). *Cf.*, *Powell*, 194 S.W.3d at 507 (presence at the scene of crime relevant to showing that defendant was guilty as a party to the offense).

The State also cites two cases in which no accomplice instruction was warranted even though a witness helped to dispose of a body. *State's Brief* at 46-51. But, those cases do not stand for the proposition that covering up a crime is not powerful evidence of consciousness of guilt. Instead, they show once again that helping to cover up a crime is only one part of the totality of the circumstances. For example, in *Paredes v. State*, the witnesses in question had no involvement whatsoever before the murders in question took place. Therefore, they could not have been "involved in the planning of the murders." 129 S.W.3d 530, 537-38 (Tex. Crim. App. 2004). And, in *Druery*, the Court had already found that the witness was a terrified bystander, who believed his life was in danger. *Druery*, 225 S.W.3d at 499-500.

II. A reviewing court should defer to the factual inferences made by the fact-finder.

The State also errs when it overlooks the standard of review. In several of the cases it highlights, the Court was reviewing a trial court's failure to deliver an accomplice instruction. *Ferguson*, 573 S.W.2d at 524; *Paredes*, 129 S.W.3d at 536. That inquiry is deferential and requires that the factual inferences be viewed in the light favorable to the trial court's determination. *Smith*, 332 S.W.3d at 441. By contrast, in the case at bar, the State asks the Court to do the opposite—review the

granting of an accomplice instruction. Unlike the State's cases, that review is deferential in favor of upholding the accomplice instruction. *Id.*;[13] *Zamora*, 411 S.W.3d at 510 (accomplice-as-a-matter-of-fact instruction warranted when evidence is "conflicting or inconclusive").

III. Hogarth was an accomplice if there was probable cause that he attempted to assist in the crime or that he was part of the conspiracy.

The State also fails to look at the accomplice evidence through the lens of the relevant statutory standards. An "accomplice is a person who may be charged with the same or lesser-included offense as that with which the defendant is charged…" *Zamora*, 411 S.W.3d at 511. A person "may be charged with an offense as a principal, a direct party, or as a co-conspirator" and therefore a witness can be an accomplice under any of those theories. *Id.*

It is only when considering the direct-party theory of accomplice culpability that the "affirmative act" requirement applies. *See id.* at 510 (case law setting out affirmative act requirement was implicitly referring to direct-party theory). In the case at bar, the trial court gave the jury an accomplice- accomplice-as-a-matter-of-fact instruction on Hogarth that included both the direct-party and the co-

[13] And, in several of the State's cases, the Court was solely looking for evidence of an "affirmative act." *Kunkle*, 771 S.W.2d at 441; *Druery*, 225 S.W.3d at 499-500. By contrast, here the jury was also charged that Hogarth could have been culpable as a conspirator (C.R. at 136).

conspirator theories of culpability (C.R. at 133-35). That means Hogarth was an accomplice if:

1. "acting with intent to promote or assist the commission of the [aggravated robbery or any lesser-included offense], he solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid the other person to commit the offense." Tex. Penal Code § 7.02(a)(2); or
2. he conspired to commit a felony and aggravated robbery, or a lesser-included offense, was committed in furtherance of the unlawful purpose and should have been anticipated as a result of carrying out the conspiracy. Tex. Penal Code § 7.02(b).

Only under the first of those two theories is an "affirmative act" part of the analysis. *See Zamora,* 411 S.W.3d at 510.

In addition, the affirmative act requirement itself must be viewed in light of the statutory language of section 7.02(a)(2). That provision states that a person is a party to an offense if he "act[s] with intent to promote" the offense. Tex. Penal Code § 7.02(a)(2). It then lists what sort of actions are included in the statutory definition. *Id.* Those actions include encouraging another to commit the offense or attempting to aid another in committing the offense. *Id.* Therefore the "affirmative act" required to constitute a direct party to a crime can be the "act" of orally

encouraging the commission of the crime. *Id.* It can also be the "act" of attempting (but not succeeding) to aid in the offense. *Id.*

IV. There was ample evidence supporting an accomplice instruction.

In the case at bar, Hogarth did not just happen to be present a single time before or during the robbery. Nor was he a terrified bystander who was "against" the crime. On the contrary, he was there during the planning sessions, the scouting mission, and the moment they left to commit the crime (IIIR.R. at 44, 46, 69, 236-37). And, until the last moment, Hogarth himself admitted that he was thinking "really hard" about going along (IIIR.R. at 45-46). Far from being unaware that a crime would take place, *cf.*, *Druery,* 225 S.W.3d at 500 (important that the witnesses did not believe crime was about to take place), that admission is evidence that his continual presence during the planning stages was as an active participant in the conspiracy (*see also* IIIR.R. at 223-24 (Trevino saying Hogarth was as guilty as the rest of them under law of parties)).

Moreover, other evidence showed that in addition to being invited to participate in the robbery (*id.*; IVR.R. at 99-100), Hogarth actually accepted that invitation and attempted to go with, thereby attempting to aid in the crime. Tex. Penal Code § 7.02(a)(2). That fact could easily be inferred from the evidence that he was upset on the day of the robbery that he was left behind (IIIR.R. at 237; *see*

also id. at 42 (answering, "Gus's cousin…at the tattoo shop" when asked who he was planning to rob and where)).

The jury could also consider the uncontroverted evidence that, just before the robbery, Hogarth helped the perpetrators plan a different robbery (IIIR.R. at 205, 234-35). After being present for the scouting mission and the planning sessions, Hogarth gave the perpetrators the 'mark' for the first robbery (*id.*). The robbery failed, however, and the perpetrators returned home (IIIR.R. at 205). They then decided to commit the robbery at issue in this case (*id.*). Hogarth was still there when they left (IIIR.R. at 46, 236-37).

The doctrine of chances states that "evidence of the repetition of similar unusual events over time demonstrate a decreasing probability that those unusual events occurred by chance." *Holcomb v. State*, 445 S.W.3d 767, 782 (Tex. App.—Houston [1st Dist.] 2014) (quotation omitted). Under the doctrine of chances, the jury could consider the first robbery when considering the likelihood that Hogarth's innocent explanation for the second robbery was true, which, improbably, was that he just happened to be sitting innocently by during the scouting mission for the crime, during the planning of the crime, and on the day of the crime as the perpetrators prepared to leave (IIIR.R. at 43-46, 70, 89-90). It would be reasonable for a jury to reject the innocent gloss the State tried to put on those circumstances and to conclude instead that Hogarth was part of the

conspiracy or attended the planning sessions with intent to promote or assist in the crime, or a lesser-included offense.[14] *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (circumstantial evidence is as probative as direct evidence).

Under the totality of the circumstances, Hogarth's conduct after the crime is also powerful evidence of the significance of his actions before the crime. This is because evidence of consciousness of guilt, including efforts to suppress evidence, "is perhaps one of the strongest kinds of evidence of guilt." *Torres v. State*, 794 S.W.2d 596, 598 (Tex. App.—Austin 1990). Here, there was evidence that Hogarth

- repeatedly lied to law enforcement (IIIR.R. at 73; IVR.R. at 25, 93),
- tried to dodge the police (IVR.R. at 21),
- refused the search of his cell phone, which contained evidence, after promising to provide it (IIIR.R. at 87-88; IVR.R. at 26-27)
- told a witness not to speak to the police (IVR.R. at 119-21, 123-24 (detective believed Hogarth told Trevino's wife to stay quiet)) and
- helped Trevino hide from the police, then lied and told the police he didn't know where Trevino was (IVR.R. at 121-22; IIIR.R. at 53).

[14] This could include Class C Misdemeanor theft, which is a lesser-included of aggravated robbery. *Earls v. State*, 707 S.W.2d 82, 84-85 (Tex. Crim. App. 1986); Tex. Penal Code § 31.03(a), (e)(1).

Hogarth also admitted that he had thought of himself as a suspect and only helped the police when they offered him money (IIIR.R. at 89, 96). *See Hancock v. State*, No. 09-17-00239-CR, 2019 Tex. App. LEXIS 4377, at *15 (Tex. App.—Beaumont May 29, 2019) (mem. op., not designated for publication) ("And when defendants ask others to give the police false information relevant to an official investigation into a crime, the jury can infer they know they are guilty."); *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt.").

There was also evidence at trial that Hogarth was not an accomplice (*see, e.g.*, (IIIR.R. at 89-90) (Hogarth denying participation in scouting mission); *id.* at 203-04 (Trevino saying Hogarth wasn't really part of the plan during scouting mission)). But, the trial court was correct that the jury could disbelieve that testimony and resolve the conflicts in the record in favor of finding him to be an accomplice. *Johnson v. State*, 571 S.W.2d 170, 173 (Tex. Crim. App. 1978). And, although Hogarth said he avoided the police after the crime because he was afraid (IIIR.R. at 92-93), a jury could find that he decided to cast blame on others and deny any involvement because he was already on probation and was afraid of losing custody of his son (IIIR.R. at 67-68). Or it could conclude that he only changed his mind about helping the police when they offered him money and that a

threat was therefore not, in fact, motivating his actions (IIIR.R. at 89). Or it could conclude that he justifiably considered himself to be a suspect and avoided the police because he was culpable (IIIR.R. at 96). *See also Medina v. State*, 7 S.W.3d 633, 642 (Tex. Crim. App. 1999) ("(1) [witness's] presence in the car with appellant when the crime occurred, (2) evidence that the crime was a gang-motivated crime, (3) [witness's] membership in the same gang as appellant, and (4) [witness's] efforts to cover up the crime" enough to establish he was an accomplice); (IIIR.R. at 227-28 (Trevino and Taylor sold drugs with Hogarth)).

The record provided the trial court ample justification for an accomplice-as-a-matter-of-fact instruction. Its decision should not be disturbed.

FOURTH GROUND FOR REVIEW: Once an accomplice-as-a-matter-of-fact instruction is warranted, there is a presumption that a witness is an accomplice unless the State proves beyond a reasonable doubt that he is not.

The State admits that, when an accomplice-as-a-matter-of-fact instruction is warranted, Texas courts have, for at least 100 years, applied a presumption that the witness is an accomplice. *State's Brief* at 53-55. However, the State says that that practice of more than a century was a series of random events unconnected to any underlying principles important to our system of laws. *Id.* In other words, it says that there is nothing in our law that requires the presumption to lie where it does. *Id.* at 52-55. Therefore, the Court might as well change the presumption in a way that benefits prosecutors. *Id.* at 55.

In fact, as demonstrated below, keeping the burden where it is is required by Texas statutory law and the U.S. Constitution. It is also firmly engrained in our common law. The Court should reaffirm that, when an accomplice-as-a-matter-of-fact instruction is warranted, the instruction should tell the jury to treat the witness as an accomplice unless it believes beyond a reasonable doubt that he is not.

I. The common law fills in the gaps left by Article 38.14.

In support of its argument, the State says it is significant that Article 38.14 does not state where the burden lies when an accomplice-as-a-matter-of-fact instruction is warranted. *State's Brief* at 52, 55. However, that fact is not significant because Article 38.14 says very little about how the accomplice rule should be effectuated. Tex. Code Crim. Proc. Art. 38.14. Instead, it left it to the courts to determine the proper jury instructions to fulfill its purpose. *Id.*; *Holladay v. State*, 709 S.W.2d 194, 198 (Tex. Crim. App. 1986) (noting that Article 38.14 did not "define the terms in which an instruction to the jury shall be framed…"). It sets out the circumstance in which a conviction can be based on accomplice testimony, but does not mention the accomplice in-fact/in-law distinction or the standards that govern them. Tex. Code Crim. Proc. Art. 38.14. The common law of Texas has filled in those gaps, creating the accomplice-in-law/in-fact distinction, and creating numerous rules designed to guide the jury's understanding of the accomplice rule. *See, e.g.*, *Zamora*, 411 S.W.3d at 510-11 (discussing definition of

accomplice and required instructions, which are not found in the statute). *See also* Tex. Code Crim. Proc. Art. 1.27 ("If this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern.").

The presumption at issue in this case is part the common law as well. A review of the caselaw demonstrates that, once the evidence raises the accomplice issue, Texas courts have, since at least 1904, created a presumption that a witness is an accomplice unless there is proof beyond a reasonable doubt that he is not. *See Harrison v. State*, 47 Tex. Crim. 393, 394 (1904) (jury was instructed that if it had a reasonable doubt whether or not witness was an accomplice, it should treat the witness as an accomplice); *Haney v. State*, 951 S.W.2d 551, 553 (Tex. App.—Waco 1997) (same); *Cyr v. State*, 308 S.W.3d 19, 24 (Tex. App.—San Antonio 2009) (same); *Losoya v. State*, No. 05-10-00396-CR, 2012 Tex. App. LEXIS 5103, at *14 (Tex. App.—Dallas June 27, 2012) (mem. op., not designated for publication) (same); *Estrada v. State*, No. 08-15-00271, 2018 Tex. App. LEXIS 4885, at *7-8 (Tex. App.—El Paso June 29, 2018) (mem. op., not designated for publication) (same).

Because accomplice instructions, although required by statute, are largely derived from the common law establishing how to implement that statute, and because courts have applied a presumption that a witness is an accomplice for

more than one hundred years, the Court should hold that the Court of Appeals was correct that the trial court erred in inverting the presumption and requiring evidence beyond a reasonable doubt that Hogarth was an accomplice rather than that he was not an accomplice (C.R. at 137). *Ruffins*, 613 S.W.3d at 199.

II. The Due Process Clause forbids shifting the burden to a defendant.

In its opinion, the Court of Appeals cited the Tenth Court of Appeals' opinion in *Haney v. State*. 951 S.W.2d at 553. *Ruffins*, 613 S.W.3d at 199. In *Haney*, the appellant claimed that an accomplice-as-a-matter-of-fact instruction improperly shifted the burden to him to show that a witness was an accomplice by using the words "or not" in the phrase if "you have a reasonable doubt whether he was or not." *Haney*, 951 S.W.2d at 553. The Court of Appeals held that that language did not improperly shift the burden. *Id.* at 553-54.

The State claims that the *Haney* court somehow found that there was no charge error without making any statement about what a proper charge would look like. *State's Brief* at 55-58. In fact, a plain reading of *Haney* shows that it did examine the charge that was given and conclude that it was not only proper, but also indicated that, if the burden had been shifted to the defendant, it would have violated due process. *Haney*, 951 S.W.2d at 553-54. This is because doing so would lessen the State's burden of proof. *Id.*

Under the Due Process Clause, the State has the burden of proving every element of a crime beyond a reasonable doubt. *Smith v. United States*, 568 U.S. 106, 110 (2013); U.S. Const. Amends. V, XIV. For that reason, due process forbids shifting that burden of proof onto the defense. *Id.* The U.S. Supreme Court has explained that, in determining whether due process prohibits burden-shifting, the Court looks to whether a defense provides an excuse for a crime—in other words, despite the fact that a defendant is guilty, it allows a defendant to go free—or whether the defense calls into question the defendant's guilt in the first place. *Id.* at 110-11.

Here, the State wanted to use Hogarth's testimony to meet its burden of proof. However, the trial court determined that there was a fact issue on the extent to which the State could rely on his testimony (C.R. at 136-37). Since it is the State that wanted to use that witness to meet its burden of proof, it is the State that should bear the burden of proving that he is not an accomplice. Shifting the burden to the defense forces the defendant to disprove that the State has presented reliable evidence—a question that bears directly on his guilt or innocence. *Smith*, 568 U.S. at 110-11. *See also Castillo v. State*, 913 S.W.2d 529, 535 n.3 (Tex. Crim. App. 1995) (Article 38.14 says that "a reasonable doubt exists if the only evidence the State presents in satisfaction of its burden of proof is the testimony of an uncorroborated accomplice witness.").

Because the accomplice question bears directly on the State's burden of proof by determining what evidence is sufficient to establish a defendant's guilt, the Court should find that it violates due process to shift the burden of proving whether a witness is an accomplice away from the State and onto the defendant. *Smith*, 568 U.S. at 110-11; U.S. Const. Amends. V, XIV. Once a question about its reliability is raised, it is the State that should prove that its own evidence is of sufficient quality to meet its burden of proof. Therefore, the Court of Appeals was correct that the trial court erred in requiring proof beyond a reasonable doubt that Hogarth was an accomplice; it should have required the State to prove beyond a reasonable doubt that he was not. *Ruffins*, 613 S.W.3d at 199, 202.

III. Section 2.05(b) of the Texas Penal Code requires that the burden rest on the State to prove that a witness is not an accomplice.

Shifting the burden to the defendant is also prohibited by Section 2.05(b) of the Texas Penal Code. When the law creates a presumption that favors the defendant, Section 2.05(b) requires that an instruction on that presumption place the burden on the State to prove that it does not exist. Tex. Penal Code § 2.05(b). It says:

> (b) When this code or another penal law establishes a presumption in favor of the defendant with respect to any fact, it has the following consequences:
>
> [. . .]
>
> (2) **if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption, that**:

(A) **the presumption applies unless the state proves beyond a reasonable doubt that the facts giving rise to the presumption do not exist**;

(B) if the state fails to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist, the jury must find that the presumed fact exists;

[. . .]

(D) if the jury has a reasonable doubt as to whether the presumed fact exists, the presumption applies and the jury must consider the presumed fact to exist.

Tex. Penal Code § 2.05(b) (emphasis added).

Therefore, once the trial court determines that an instruction on the presumption is warranted, it must inform the jury that it must apply the presumption unless the State proves beyond a reasonable doubt that it does not apply. *Id.*

Article 38.14 creates a presumption that if a witness is an accomplice, his or her testimony is inherently unreliable and that it is insufficient, standing alone, to sustain a conviction. Tex. Code Crim. Proc. Art. 38.14. That presumption undoubtedly favors the defendant. *See Zamora*, 411 S.W.3d at 514 ("We agree with those courts that have observed that it is difficult to envision that any competent attorney would reasonably forego an accomplice-witness jury instruction as a matter of strategy based on his theory of the case.").

Because the Article 38.14 presumption favors the defendant, Section 2.05(b) applies. In submitting "the existence of the presumed fact" to the jury, the trial court was required to place the burden on the State to prove that Hogarth was not an accomplice. Tex. Penal Code § 2.05(b).

IV. Other provisions of the Penal Code forbid placing the burden on the defense.

Section 2.05(b) is not alone in requiring this result. Other provisions of the Penal Code also demonstrate that the State has the burden of showing that its own evidence can be used to meet its burden of proof.

Chapter 2 of the Texas Penal Code sets out when the burden of proof can be placed on a defendant in a criminal trial. It is only when a provision is specifically labeled an "affirmative defense" that the burden can be placed on the defendant and, even then, the burden is only by a preponderance of the evidence. Tex. Penal Code § 2.04.

Here, the accomplice-witness rule is plainly not labeled an affirmative defense. Tex. Code Crim. Proc. Art. 38.14. The Penal Code says that, for all other fact questions, the burden of persuasion, at the very least, is on the State. *See* Tex. Penal Code § 2.03 (even if not so labeled, any ground of defense raised by the evidence requires the jury to be charged "that a reasonable doubt on the issue requires that the defendant be acquitted"); Tex. Penal Code § 2.05 (burden is on the State to disprove beyond a reasonable doubt presumption that favors the

defense, if it has been raised by the evidence, and burden is on the State to prove existence of facts underlying any other presumption); Tex. Penal Code § 2.02 (State must prove beyond a reasonable doubt that defendant doesn't fall under an exception).

The State's string cites and quotations from other jurisdictions do not speak to the checks and balances in place in our system of laws. *State's Brief* at 59-61. Our penal code dictates that a defendant only bears the burden of proof for affirmative defenses. Tex. Penal Code § 2.01-05. The State has cited not one single case from this State that puts the burden on the defendant in a jury charge for anything else.

Quoting an opinion from Oregon, the State also says that the burden should be on a defendant because the defendant could receive a benefit from the instruction. *State's Brief* at 60. Our law has rejected that rational as well. Even when an instruction could benefit a defendant, it consistently puts the burden on the State to disprove the relevant underlying facts. *See, e.g.*, Tex. Penal Code § 2.02-05 (described, *supra*); Tex. Code Crim. Proc. Art. 38.22, Sec. 6 (on question of voluntariness, stating that the jury "shall be instructed that unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof."); Tex. Code Crim. Proc. Art. 38.23(a) (where the evidence

creates a question about whether evidence was obtained legally, the "the jury shall be instructed that if it believes, or has a reasonable doubt" that it was obtained in violation of the law, "the jury shall disregard any such evidence so obtained.").

V. *Lundy v. State* is about the burden of production, not the burden of persuasion.

The State's argument also conflates the burden of production with the burden of persuasion. *State's Brief* at 58-59. The burden of production refers to the burden a defendant carries to convince a trial court that a fact issue should be put before the jury. *Williams v. State*, 851 S.W.2d 282, 286 (Tex. Crim. App. 1993). The burden of persuasion is the burden to convince the fact finder regarding whether the condition in question is true. *Id.*

Relying on *Lundy v. State*, the State says that "it appears" that the burden rests on defendants to demonstrate that a witness is an accomplice. *State's Brief* at 58-59 *citing Lundy v. State*, 296 S.W.2d 775, 776 (Tex. Crim. App. 1956). However, in *Lundy* the Court was discussing the burden of production—that is, the burden of showing that an accomplice instruction is warranted in the first place. *Lundy*, 296 S.W.2d at 112. *Lundy* has nothing to do with the burden of persuasion in an accomplice-as-a-matter-of-fact instruction.

There is nothing new in placing the burden of production on a defendant to show that an issue should be submitted to the jury. Tex. Penal Code § 2.03; Tex. Penal Code § 2.05(b); Tex. Code Crim. Proc. Art. 38.23(a). Once it has met that

burden, the State has the burden to prove that the condition does not exist beyond a reasonable doubt. *Id.* The same is true of accomplice instructions. *Lundy*, 296 S.W.2d at 112; *Haney*, 951 S.W.2d at 553-54.

VI. The State agrees that the instruction in the case at bar was erroneous.

The State asks the Court to hold that an accomplice-as-a-matter-of-fact instruction should put the burden on the defendant to prove that a witness is an accomplice by a preponderance of the evidence, which it concedes would still render the instruction in this case erroneous. *State's Brief* at 62. If the Court does agree with the State on this issue, Appellant requests that the Court remand the case to the Court of Appeals to consider the question of harm. In the alternative, he asks the Court to order additional briefing on the question of harm or to find that the error was harmful for the same reasons set out herein and in Appellant's briefing before the Third Court of Appeals (*see Appellant's Brief* at 26-35 (Tex. App.—Austin, NO. 03-18-00540-CR); *supra*, pp. 11-36).

However, for the reasons set out above, the State's arguments do not have merit. Not only the federal constitution, but also Texas's system of laws, forbids lessening the State's burden of proof, which is why the State must bear the burden of showing that its own evidence is reliable enough to secure a conviction. Accordingly, the decision of the Third Court of Appeals should be upheld.

PRAYER

Appellant respectfully prays that the Court would affirm the decision of the Third Court of Appeals. He prays for that and any other relief to which he may be entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 14,983 words (excluding the caption, table of contents, table of authorities, statement of the case, signature, certificate of service, and certificate of compliance). This is a computer-generated document using at least 14-point typeface for all text, except for footnotes which are in 12-point typeface. In making

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/s/ Karen E. Oprea
Karen E. Oprea
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CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of the foregoing APPELLANT'S RESPONSE BRIEF, was sent by email to the Comal County District Attorney's Office at doyerj@co.comal.tx.us and preslj@co.comal.tx.us, and to the State Prosecuting Attorney's Office at information@spa.texas.gov on this 3rd day of May, 2021.

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